Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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| In the Matter of | ) | |
| | ) | |
| Local Exchange Carrier's Rates, | ) | CC Docket No. 93-162 |
| Terms and Conditions for Expanded | ) | Phase I |
| Interconnection for Special Access | ) | |



ORIGINAL

# PETITION FOR RECONSIDERATION

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December 13, 1993

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## SUMMARY

The Commission's interim prescription of certain expanded interconnection charges conflicts with the authority granted under the Communications Act. Having chosen to proceed under Section 204(a) of the Act, the Commission has failed to follow the express provisions of that Section which permits the rates filed initially by a carrier to take effect at the end of the suspension period when, as here, the Commission has not completed its investigation.

The unambiguous mandate of the statute is that the rates filed by a carrier "shall go into effect" after a five-month suspension period, if the Commission has not found them unjust and unreasonable. In the instant case, the Commission has ignored this mandate.

The Commission's Order did not find the expanded interconnection rates unlawful within the bounds of the statute. To the contrary, the Commission acknowledged that it did not have sufficient information, based on the LECs' submissions, to decide the justness and reasonableness of the filed rates. A finding that LEC justification was lacking was not the equivalent of finding a rate to be unjust and unreasonable. In these circumstances, the Commission had no choice but to follow the mandate of Section 204(a) and allow the filed rates to take effect at the conclusion of the suspension period.

Because the interim prescription is inconsistent with the requirements of the Communications Act, Section 4(i) provides no authority for the Commission's action. Rather than follow the statutory scheme set forth in the Communications Act, the Commission, under the guise of the ancillary powers provided to it under Section 4(i), has rewritten the Communications Act. The Commission has been admonished in the past that it is not free to circumvent the statute. There is simply no regulatory authority granted to the Commission by virtue of Section 4(i) which permits it to bypass the statutory plan of carrier-initiated rate changes, a limited suspension period, rate refunds and rate prescriptions.

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| Local Exchange Carrier's Rates, Terms and Conditions for Expanded Interconnection for Special Access | ) | CC Docket No. 93-162 Phase I |

# PETITION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth") hereby submits its Petition for Reconsideration of the Commission's First Report and Order in CC Docket No. 93-162 released November 12, 1993.[1]

## I. INTRODUCTION

On October 19, 1992, the Commission released an order directing local exchange carriers (LECs) to file tariffs which would provide expanded interconnection to LEC interstate special access services to all interstate users.[2] In compliance with the Commission's order, BellSouth filed its expanded interconnection offering on February 16, 1993, under Transmittal No. 92, to be effective on May 17, 1993. Subsequently, the Commission deferred the effective date of the tariff until June 16, 1993, and thereby provided a 120

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[1] Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, Phase I, (FCC 93-493), First Report and Order, released November 12, 1993 (hereinafter "First Report and Order").

[2] Expanded Interconnection with Local Telephone Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992).

day notice period, the maximum notice period the Commission could require under the Communications Act.[3]

On June 9, 1993, the Commission, pursuant to the authority granted under Section 204(a) of the Act, issued an order partially suspending for the full five month period provided under the statute the filed rates for expanded interconnection service.[4] Questions regarding the lawfulness of BellSouth's filed rates and certain terms and conditions for expanded interconnection service were set for investigation. The specific issues to be addressed in the investigation and requests for information were identified in the Commission's Designation Order, released July 23, 1993.[5]

In accordance with the Designation Order, BellSouth, on August 20, 1993 filed its Direct Case. Oppositions by seven parties were filed on September 20, 1993. BellSouth filed its Reply on September 30, 1993. Forty three days following BellSouth's final submission, the Commission issued its First Report and Order in the investigation. The First

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[3] See 47 U.S.C. § 203(b)(2).

[4] In the Matter of Ameritech Operating Companies Revisions to Tariff FCC No. 2 et al, CC Docket No. 93-162, 8 FCC Rcd 4589 (1993). Specifically, the Commission suspended for a day the filed rates in their entirety but permitted a portion of the rates to become effective subject to an accounting order, with the remainder of the rates suspended for a five month period.

[5] Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 6909 (1993) (hereinafter "Designation Order").

Report and Order reserved for a subsequent order, a resolution of the issues surrounding the terms and conditions of expanded interconnection. The First Report and Order also concluded that the LECs had not demonstrated that the overhead loadings included in their filed rates were just and reasonable. Accordingly, the Commission found:

> Although we find the LECs' rates to be insufficiently justified — and thus unlawful — on the current record, we also lack sufficient information to make a permanent rate prescription.[6]

Therefore, the Commission prescribed, "on an interim basis, a maximum permissible overhead loading factor for expanded interconnection rates, pending further investigation, after which we expect to determine and, if necessary, prescribe rate levels that are just and reasonable."[7] This "interim prescription is subject to a two-way adjustment mechanism that will protect both the customers and the LECs in the event refunds or supplemental payments are warranted at the conclusion of our further investigation."[8]

The Commission's interim prescription conflicts with the authority granted to the Commission under the Communications Act. Having chosen to proceed under Section 204(a) of the Act, the Commission has failed to follow the express provisions of that Section which permits the rates

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[6] First Report and Order at ¶ 35.

[7] First Report and Order at ¶ 2.

[8] Id.

filed initially by a carrier to take effect at the end of the suspension period if, as is clearly the case here, the Commission has not completed its investigation.

## II. ARGUMENT

### A. The Commission's Authority Under Section 204(a) of the Act is Limited.

The provisions of Section 204(a) are clear and unambiguous. When a charge is filed by a carrier, the Commission may suspend its operation for a maximum period of five months. During the suspension period the Commission can conduct a hearing as to the lawfulness of the tariff filing. The statute further provides that if at the end of the suspension period the Commission has not concluded its proceeding:

> ...the proposed new or revised, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or revised charge, the Commission may by order require the interested carrier or carriers to keep an accurate account of all amounts received by reason of such charge for a new service or revised charge...and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest...such portion of such charge for a new service or revised charges as by its decision shall not be found not justified.

Section 204(a) is part of a carefully crafted regulatory approach that is grounded on carrier-initiated tariffs. Carrier-initiated tariffs provide the foundation upon which Congress' statutory scheme achieves stability, predictability, and protection of the public interest. There is only a single exception to the long established

precept that once a tariffed charge has become effective, carrier and consumers are entitled to rely on it, and that exception is found in Section 204(a) which permits refunds to be ordered.

Such an exception is profound in its departure from the stability and predictability afforded by the filed rate doctrine. Accordingly, the exception is not unbounded. The statutory provision has specific procedural safeguards which "represents a careful accommodation of the various interests involved."[9] The Courts have recognized this balance and have refused to take any action which would disturb the statutory equilibrium.[10]

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[9] United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 697 (1973). In SCRAP, the Supreme Court interpreted provisions of the Interstate Commerce Act similar to those contained in Section 204(a) of the Communications Act.

[10] For example, in SCRAP, the Supreme Court held that the judiciary cannot enjoin the effectiveness of railroad initiated surcharges for alleged violations of the National Environmental Policy Act (NEPA) after the ICC had already acted and refused to suspend the surcharges. The Court remarked that "[t]o allow judicial suspension for non-compliance with NEPA would disturb this balance of interests." 412 U.S. at 697. The SCRAP decision amplified the Court's 1963 holding in Arrow Transportation v. Southern Railway Co., that a court may not delay the effectiveness of new rates once the maximum statutory suspension period expired because such a judicial delay would upset the compromise between the interests of the public and the carrier which Congress meant to strike by limiting the ICC's suspension power. 372 U.S. 658 (1963). The holdings in SCRAP and Arrow as they apply to the Communications Act have also been discussed by the Courts. See e.g., AT&T v. FCC, 487 F.2d 865, 873-874 (2nd Cir. 1973); MCI v. FCC, 627 F.2d 322, 339 (D.C. Cir. 1980).

The clear and unambiguous mandate of the statute is that the rates filed by a carrier "shall go into effect" after a five month suspension period, if the Commission has not found them unjust and unreasonable. In the instant case, the Commission has ignored this mandate.

The Commission, in its Order, admitted that it had insufficient information to make a final determination regarding the reasonableness of the filed rates or to prescribe just and reasonable rates.[11] Despite the First Report and Order's language that the expanded interconnection are "unjust and unreasonable and therefore unlawful,[12]" the Commission's discussion makes it clear that the finding made in the investigation was that the LECs had not met their statutory burden of showing that the rates were just and reasonable. Specifically, the Commission stated:

> In view of the numerous deficiencies in the LECs' direct cases, we find that the LECs have thus far justified neither their overhead loading factors nor their comparisons based on closure factors using prospective costs. Based on the current record, the LECs have failed to meet their burden of proof under Section 204(a) of justifying their proposed overhead loadings for expanded interconnection services.[13]

Not only did the Commission determine that the LECs had not justified the filed rates, but also that the Commission

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[11] First Report and Order at ¶ 35.

[12] Id. at ¶ 26.

[13] Id. at ¶ 34.

"lack[ed] sufficient information to make a permanent rate prescription."[14] Thus, despite the First Report and Order's rhetoric, the Commission by its own judgment could not decide whether the proposed rates were just and reasonable or unjust and unreasonable.

The current situation is not unlike one addressed by the Court of Appeals in MCI v. FCC, where the Commission in its order had repeatedly made the assertions that AT&T's WATS tariff revisions were "unlawful" and "null and void," but nevertheless had permitted these revisions to remain in effect.[15] The Court found that the thrust of the Commission's decision was that the record was insufficient to support AT&T's tariff revisions. Accordingly, the Court concluded that a "filed tariff, like those here, not found by the FCC to be either just and reasonable or unjust and unreasonable on the basis of the carriers supporting evidence at the point of filing can avoid the stigma of unlawfulness...."[16]

So too here, the First Report and Order did not find the expanded interconnection rates unlawful within the bounds of the statute (i.e., unjust and unreasonable) because the Commission, by its own admission, did not have sufficient information, based on the LECs' submissions, to make a final determination regarding the justness and

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[14] Id. at ¶ 35.

[15] MCI v. FCC, 627 F.2d 322 (D.C. Cir. 1980)

[16] Id. at 338.

reasonableness of the filed rates. Simply put, the finding that LEC justification of the filed rates was lacking was not the equivalent of finding a rate to be unjust and unreasonable.[17] Accordingly, the Commission had no choice but to follow the mandate of Section 204(a) at the conclusion of the suspension period and permit the filed rates to take effect.

### B. Section 154(i) of the Communications Act Does Not Provide Authority For the Commission's "Interim Prescription".

The Commission relied on Section 154(i) of the Communications Act for its authority to make an interim rate prescription.[18] This Section of the Communications Act gives the Commission authority to "issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[19] The interim prescription is inconsistent with the statutory requirements of Sections 204

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[17] Even the approach followed by the Commission in the First Report and Order, although beyond authority granted in the statute, serves to underscore that the Commission did not find the filed rates unjust and unreasonable. The Commission's approach would permit the retroactive collection of the difference between the filed rates and the "prescribed interim rates" at the conclusion of the further investigation. In effect, then, the First Report and Order recognizes that the filed rates still can be justified and found to be just and reasonable. Clearly, since this possibility exists, the First Report and Order could not have already have found these rates to be unjust and unreasonable.

[18] 47 USC § 154(i).

[19] Id.

and 205 of the Act, and therefore Section 4(i) provides no basis for the Commission's action.

The Commission's action is not a lawful prescription under Section 205 of the Act. Section 205 empowers the Commission to determine and prescribe lawful rates. This authority, however, is not unlimited.[20] A rate prescription, even for an interim period, may be entered only after a full opportunity for hearing and that the rate to be prescribed will be just and reasonable. Neither condition has been met. The Commission acknowledges that its investigation is continuing. Thus, the First Report and Order states that the interim prescription "in no way limits or prejudges any action we may take in our final order concluding this investigation."[21]

Likewise, the interim prescription does not satisfy the second condition of a valid prescription, that the prescribed rate is just and reasonable.[22] Apart from the Commission's admission it could not determine a final just and reasonable rate, the two-way adjustment mechanism attached to the interim prescription is inconsistent with a Section 205 prescription. Because a prescribed rate must be determined to be just and reasonable, a subsequent determination cannot then find that same rate to be unjust

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[20] See e.g., American Telephone & Telegraph Company v. FCC, 449 F.2d 439, 450 (2nd Cir. 1971).

[21] First Report and Order at ¶ 38.

[22] See, e.g., Nader v. FCC, 520 F.2d 182, 204 (D.C. Cir. 1975).

and unreasonable.[23] Yet that is precisely the effect of the two-way adjustment mechanism. It would allow the Commission to determine at some future date that during the period the interim prescribed rate was in effect it was either unreasonably high or unreasonably low. Thus, the First Report and Order is contrary to the statutory requirements of a Section 205 prescription.

Since the First Report and Order is inconsistent with Section 205, the Commission can, then, only claim that it is using its ancillary powers under 4(i) in conjunction with Section 204(a). As shown above, the Commission's "interim prescription" is incompatible with the statutory mandate of Section 204(a).

Rather than following the statutory scheme set forth in the Communications Act, the Commission, under the guise of the ancillary powers provided to it under Section 4(i), has rewritten the Communications Act. The Commission has been admonished in the past that it is not free to circumvent the statutory scheme by making its own equitable adjustments:

> In enacting Sections 203-205 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance.[footnote omitted] Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.[24]

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[23] Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Railway Co., 284 U.S. 370 (1932).

[24] 487 F.2d at 874.

There is simply no regulatory authority granted to the Commission by virtue of Section 4(i) which permits it to bypass the statutory plan of carrier-initiated rate changes, a limited suspension period, rate refunds and rate prescriptions.

Nor can the Commission take any comfort from the Lincoln Telephone and Telegraph case.[25] Lincoln involved a situation where MCI had been authorized to provide Execunet service and required physical interconnection to Lincoln Telephone and Telegraph's exchange facilities. MCI first requested such interconnection in October 1978. Lincoln refused to provide such interconnection until MCI and Lincoln reached agreement on appropriate interconnection charges. On July 11, 1979, the Commission issued a declaratory ruling directing Lincoln to provide MCI interconnection facilities.[26] Because the Commission found time to be of the essence, the Commission directed Lincoln to file a tariff within thirty days. Pending the effectiveness of the tariff, the Commission directed Lincoln, on an interim basis, to bill and collect "the charges that are set forth in the tariff filed by the Bell System Operating Companies pursuant to the ENFIA

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[25] Lincoln Telephone and Telegraph v. FCC, 659 F.2d 1092 (D.C. Cir. 1981) ("Lincoln").

[26] Lincoln Telephone and Telegraph's Duty to Furnish Interconnection Facilities to MCI Telecommunications Corporation, 72 F.C.C. 2d 724 (1979).

agreement."[27] The interim billing and collection arrangement was subject to a two-way adjustment. The Court of Appeals affirmed the Commission's decision.

Unlike the instant case, Lincoln did not involve carrier-initiated rates and a Section 204 proceeding. The Commission finds this distinction insignificant.[28] It argues that, like in Lincoln, its overriding concern was ensuring "the opportunity for immediate interconnection until we could determine just and reasonable rates for the service."[29] The fatal flaw in the Commission's reliance on Lincoln is that, unlike Lincoln, interconnection was already available pursuant to effective tariffs. The Court's finding in Lincoln that the interim billing and collection agreement was a proper exercise of the Commission's 4(i) powers based on the factual predicate that there had been a substantial delay in Lincoln's providing physical interconnection and the interim billing and collection arrangement was a means to provide Lincoln with funds necessary for its operations until a tariff became effective.

There is nothing in the Court's decision in Lincoln that would support the proposition that the Commission could ignore effective tariffs and the ratemaking provisions of the Communications Act and thereby determine its own interim

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[27] Id. at 728.

[28] First Report and Order at note 103.

[29] Id.

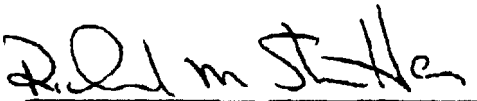
billing and collection arrangement. The First Report and Order has done nothing less here.

## III. CONCLUSION

The ratemaking provisions of the Communications Act were intended to provide for an orderly processing of proposed rate revisions. Congress created a comprehensive statutory plan which balanced the interests of both carriers and consumers — a plan which the Commission is not free to disregard. In prescribing interim expanded interconnection charges, the Commission ignored the mandate of Section 204(a) of the Act which required that BellSouth's suspended rates be permitted to take effect at the conclusion of the suspension period. Accordingly, the Commission should reconsider its decision.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 13th day of December, 1993 serviced all parties to this action with a copy of the foregoing PETITION FOR RECONSIDERATION by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.

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